No. 89-563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VIEUX CARRE PROPERTY OWNERS, RESIDENTS & ASSOCIATES, INC.,

Petitioner,

v.

COLONEL LLOYD KENT BROWN, *et. al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are federal agencies authorized to exempt themselves from the broad statutory mandate of the National Historic Preservation Act by the regulatory adoption of abbreviated permitting procedures, created solely for purposes of administrative convenience?

Does this Court's decision in *California v. Sierra Club*, 451 U.S. 287 (1981), preclude the joinder of non-federal defendants acting under authority of a federal permit, where joinder is necessary to provide complete relief under the National Historic Preservation Act?

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AMICUS BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted by the National Trust for Historic Preservation in the United States as *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, in support of the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Consent to appear as *amicus* has been obtained from the United States and from the petitioner, Vieux Carré Property Owners, Residents & Associates, Inc., as evidenced by letters filed with the Clerk of this Court.[1]

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[1] The National Trust for Historic Preservation also participated as *amicus curiae* before the Fifth Circuit below.

INTEREST OF *AMICUS CURIAE*

The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 as a private, nonprofit organization, to promote public involvement in the protection of America's historic resources and to further the historic preservation policy of the United States. *See* 16 U.S.C. § 468, 461-467. The National Trust currently has more than 225,000 individual and 3000 organizational members nationwide. The National Trust's Chairman is by statute a member of the Advisory Council on Historic Preservation, an independent federal agency, which is responsible for implementing the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and for commenting on federal undertakings affecting historic resources. *See id.* §§ 470i(a)(8), 470s, 470f. The Advisory Council's duties also include reviewing the policies and programs of other federal agencies to ensure consistency with the historic preservation policies adopted by Congress. *See id.* §§ 470, 470j.

STATEMENT

This case presents substantial questions regarding whether federal agencies can unilaterally exempt themselves from mandatory environmental review statutes such as the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*, by adopting abbreviated regulatory procedures for authorizing projects requiring federal approval and supervision. The Fifth Circuit's decision not only allows such a result, contrary to the plain statutory language of the NHPA, but also undermines enforcement by refusing to allow joinder of non-federal defendants conducting an environmentally harmful project pursuant to a fed-

eral permit. In reaching this conclusion, the Fifth Circuit not only disregarded the well-reasoned decisions of other circuits but also misconstrued this Court's decision in *California v. Sierra Club*, 451 U.S. 287 (1981). Review by this Court is necessary to resolve a split in the circuits and to halt judicial erosion of the statutory scheme created by Congress for the protection of historic properties.

The Vieux Carré (also known as the French Quarter), is the original section of New Orleans, Louisiana, first laid out in 1721. The district, which has remained substantially intact, includes a unique mixture of distinctive 18th and 19th Century architectural styles, and is listed in the National Register of Historic Places. The Vieux Carré has also been designated as a National Historic Landmark District, a classification reserved for "properties of exceptional [historic] value to the nation as a whole." 36 C.F.R. § 65.2(a) (1987); *see* 16 U.S.C. § 470a(a). As a result of the district's historic status, federal agencies are required to comply with Section 106 of the NHPA prior to licensing, permitting, or funding any project that may affect the Vieux Carré's historic and architectural character. 16 U.S.C. § 470f. Because of the Vieux Carré's status as a National Historic Landmark, federal agencies are also required, under Section 110(f) of the NHPA, to minimize "to the maximum extent possible" the adverse effects of their proposed projects on the Vieux Carré. *Id.* § 470h-2(f).

The National Historic Preservation Act was enacted by Congress in 1966 to implement a broad national policy of encouraging the preservation and protection of America's historic and cultural resources. *Id.* §§ 470, 470-1. In order to promote this policy, Section

106 of the NHPA prohibits federal agencies from conducting or approving any federal "undertaking" (including any federally assisted or licensed undertaking), unless the agency, in consultation with the State Historic Preservation Officer ("SHPO"),[2] (1) takes into account the effects of the undertaking on historic properties that are listed or eligible for listing in the National Register of Historic Places; and (2) affords the Advisory Council on Historic Preservation, an independent federal agency, a reasonable opportunity to comment on the undertaking. *Id.* § 470f.[3] If the impact on historic properties is adverse, the federal agency must then consider ways in which the adverse impact can be avoided or mitigated. 36 C.F.R. § 800.5(e).

The instant lawsuit arose out of the refusal of the U.S. Army Corps of Engineers to comply with Sections 106 and 110(f) of the NHPA when it permitted four local and state government entities (the non-federal defendants below)[4] to begin construction of a new waterfront aquarium and park (the "Aquarium

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[2] The SHPO is the official in each state responsible for assisting federal agencies in carrying out their historic preservation responsibilities, 16 U.S.C. § 470(b), and is a "key participant" in the Section 106 consultation process, 36 C.F.R. § 800.1(c)(1)(ii).

[3] This review and consultation process, which is set out more fully in the regulations issued by the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, must be completed as early as possible in the decisionmaking process, and in any event prior to federal approval, licensing, or funding of the project. *Id.* § 800.3(c).

[4] The non-federal defendants were the City of New Orleans, the Audubon Park Commission, the Board of Commissioners of the Port of New Orleans, and the Board of Commissioners of the Orleans Levee District.

Project") on and adjacent to the Bienville Street Wharf, which is located entirely within the Vieux Carré National Historic Landmark District. The aquarium building itself will be a massive ultra-modern structure, which has been determined by the Louisiana SHPO to be wholly inconsistent in both scale and appearance with the historic character of the Vieux Carré.[5]

Because the Bienville Street Wharf, on which part of the Aquarium Project is to be constructed, extends into the Mississippi River, the wharf is subject to the jurisdiction of the U.S. Army Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 403. As a result, no construction can take place on the wharf without a permit from the U.S. Army Corps of Engineers. In this instance, the Army Corps' authorization of the Aquarium Project was issued in the form of a "nationwide," rather than an individual permit, which allows the "repair, rehabilitation, or replacement" of structures previously authorized by a Corps permit, 33 C.F.R. § 330.5(a)(3), since the original Bienville Street Wharf was constructed pursuant to an Army Corps permit issued in the 1930's.

The nationwide permit program is a creation of administrative convenience by the Army Corps, de-

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[5] The Louisiana SHPO also expressed "grave concern" about the adverse effects on the Vieux Carré caused by the "longterm traffic congestion, pollution, noise and vibration" that will result from the Aquarium Project. The Army Corps is required under Section 106 to consider these direct and indirect effects of the Aquarium on the Vieux Carré historic district. *See Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985).

signed to allow certain activities that would otherwise require an individual permit "to occur with little, if any, delay or paperwork." *Id.* § 330.1. Nationwide permits for repair or rehabilitation are automatic, in that no formal application is needed in order to proceed with activities falling within their scope. Nonetheless, nationwide permits are subject to revocation or modification by the Corps. *Id.* § 330.5(d).

When it became apparent that the Army Corps intended to allow the non-federal defendants to proceed with the Aquarium Project without complying with either Section 106 or Section 110(f), the petitioner Vieux Carré Property Owners, Residents & Associates, Inc. (plaintiff below), filed a complaint for declaratory relief against the Army Corps, and for injunctive relief against the non-federal defendants seeking to restrain construction of the Aquarium Project pending compliance with the NHPA. The district court denied plaintiff's request for injunctive relief, on the ground that plaintiff had no right of action against any of the non-federal defendants, and also dismissed plaintiff's claims that the Army Corps was required to comply with the NHPA.

On appeal, the Fifth Circuit reversed the district court's ruling that the Army Corps was not required to comply with Section 106 prior to authorizing the Aquarium Project under its nationwide permit program, on the grounds that a nationwide permit is a "license" within the meaning of Section 106. 875 F.2d at 465. However, notwithstanding what the court conceded to be the literal statutory language of Section 106, the court held that nationwide permits authorizing "inconsequential activities" would be deemed exempt from Section 106. The court remanded the case

to the district court "to determine whether the [Aquarium] project is so inconsequential that it nevertheless escapes the historic review requirements of the NHPA section 470f."[6] 875 F.2d at 466.

The Fifth Circuit affirmed the district court's dismissal of the non-federal defendants,[7] despite contrary precedent in the Ninth and Tenth Circuits requiring joinder of non-federal parties whose environmentally harmful actions were alleged to be improperly authorized by federal agencies and threatened to cause irreparable injury. *Id.* at 456-58. As a result, the petitioner has been prevented from securing any preliminary injunctive relief to preserve the status quo while the district court reviews the question of whether Section 106 applies to the nationwide permit at issue here.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision Creates a Conflict Among the Circuits as to Whether Federal Agencies May Exempt Themselves From Compliance with Mandatory Environmental Review Statutes

The Fifth Circuit has ruled that the Army Corps is not required to comply with Section 106 whenever the Corps unilaterally pre-determines that a project will be "inconsequential"—regardless of whether the

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[6] Trial in the district court on this issue has been scheduled for January 24, 1990.

[7] Hence, the Brief in "Opposition" to the petition for a writ of certiorari, filed with this Court on November 2, 1989 by the Audubon Park Commission and the City of New Orleans, is, at most, in the nature of an *amicus* brief, rather than the brief of a party.

environmental *effects* of the project will be "inconsequential"—and that compliance with Section 106 for such "inconsequential" projects may interfere with the Corps' asserted need for administrative convenience. 875 F.2d at 463-66. While the court admitted that such an exemption was precluded by the plain statutory language of Section 106, it reasoned that a rewriting of the statute was necessary to prevent "absurd" results. *Id.* at 465.

The Fifth Circuit's ruling is in direct conflict with the Tenth Circuit regarding whether agencies, in the name of regulatory efficiency and convenience, may unilaterally exempt themselves from compliance with mandatory environmental review statutes that, by their terms, do not permit exceptions even for "minor" agency actions. *See Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985). Moreover, the Fifth Circuit was simply wrong in asserting that the review and consultation process of Section 106 would lead to "absurd" results. The Section 106 process, as interpreted by the regulations of the Advisory Council on Historic Preservation, is an inherently reasonable and efficient one, which provides objective, uniform standards and procedures by which agencies can assess the effects of their actions on historic properties, in consultation with the agency experts on assessing such effects—the State Historic Preservation Officer and the Advisory Council on Historic Preservation.

In contrast, the exemption for "inconsequential" projects devised by the Fifth Circuit would produce the truly "absurd" result of displacing an efficient and well-crafted regulatory scheme whenever an agency decides to exempt itself from the requirements

of Section 106 by unilaterally determining its actions to be "truly inconsequential"—a standard so devoid of guidance as to be virtually unreviewable. In other words, the Fifth Circuit has created an exemption that may well swallow the whole statute. Accordingly, Supreme Court review is needed to clarify agency responsibilities under the NHPA, and prevent the strong mandate of Section 106 from being eroded through the use of regulatory procedures that place administrative convenience ahead of congressionally mandated environmental review.

A. Section 106 Applies to All Agency Authorized Activities, No Matter How "Inconsequential," Which Could Result in Changes to the Character or Use of Historic Properties.

The Fifth Circuit's ruling creates a threshold exemption from the NHPA for federally-authorized actions that are "truly inconsequential" in relation to the agency's overall goals—i.e., inconsequential in their effect on navigable waters. However, the plain statutory language of Section 106 requires agencies to "take into account the effect" of their undertakings on historic properties prior to the issuance of "*any* license."[8] 16 U.S.C. § 470f (emphasis added). This statutory language demonstrates, on its face, that Congress did not intend to allow agencies to

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[8] The Fifth Circuit's opinion is even more directly at odds with the statutory language in concluding that Section 110(f) of the NHPA, 16 U.S.C. § 470h-2(f), which specifically protects National Historic Landmarks, is "inapplicable" to *all* federal licensing and permitting activities. 875 F.2d at 463-64 n.6. By its explicit terms, Section 110(f) applies to "any Federal undertaking," which is defined by the Advisory Council's regulations to include the issuance of any federal license or permit. *See* 36 C.F.R. § 800.2(o).

adopt categorical exemptions from Section 106 for certain activities that the agency has unilaterally predetermined to be "inconsequential."[9]

The Fifth Circuit's creation of an exemption for "inconsequential" activities is squarely in conflict with the holding of the Tenth Circuit in *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985), that the Army Corps must undertake the environmental review mandated by the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, with respect to actions authorized by the Corps' nationwide permit program. The ESA, like the NHPA, requires all agencies to undertake an environmental review in connection with "any permit" issued by an agency. *Id.* § 1536(a)(3). In construing this statutory language, the Tenth Circuit noted specifically that the ESA was triggered not only by "major federal actions," but by "any permit," and unequivocally interpreted this language as requiring the Corps to

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[9] Contrary to the Fifth Circuit's assumption, the legislative history of the NHPA in no way supports an exemption from the NHPA for "inconsequential" activities. Rather, the passage from the legislative history of the 1980 amendments to the NHPA, cited by the court, 875 F.2d at 465 (citing H.R. Rep. No. 1457, 96th Cong., 2d Sess. 45, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6408), suggests only that the degree of federal involvement may affect the breadth of avoidance and mitigation measures that the agency must consider in its Section 106 review; it does not affect whether Section 106 applies in the first instance. Congress made it clear that even in the case of mere "technical assistance" from an agency to a privately funded project, the agency is expected to "take into account" the effects on historic properties, as required by Section 106. *Id.* Thus, no implied exemptions from the statute could reasonably be construed from this legislative history.

> consider the environmental impact of each act that it authorizes, *both major and minor*. In creating categories of nationwide permits, the Corps has "acted" to authorize discharges. *Thus, simply allowing a party to proceed under the nationwide permit is an action by the Corps triggering its obligation to consider environmental impacts.*

Riverside Irrigation District v. Andrews, 758 F.2d 508, 513 (10th Cir. 1985) (emphasis added).[10] In other words, if the activity is "consequential" enough to come within the Army Corps' statutory permitting jurisdiction under the RHA, it is "consequential" enough to require compliance with federal environmental review laws.

Because the Fifth Circuit's ruling is in direct conflict with that of the Tenth Circuit, this Court's review is needed to resolve this split in the circuits.

B. The Exception Created by the Fifth Circuit Is Not Necessary to Prevent "Absurd" Results, and Is Contrary to Established Principles of Administrative Procedure.

The regulations implementing Section 106, which are binding on the Army Corps,[11] do not permit an

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[10] The Fifth Circuit's reliance on *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), to distinguish *Andrews* only adds to the confusion. That case suggested that the threshold requirements for Section 106 and NEPA were identical. *Id.* at 1309. Other courts have recognized, however—as the statutory language makes clear—that Section 106 and NEPA have different jurisdictional thresholds. *See, e.g., Aertson v. Landrieu*, 488 F. Supp. 314, 322 (D. Mass.), *aff'd*, 637 F.2d 12 (1st Cir. 1980) (HUD had adequately complied with Section 106 in funding a housing project, but the housing project was not a "major federal action" under NEPA).

[11] The Advisory Council has the exclusive authority to deter-

agency to adopt "categorical exclusions" for actions that would not significantly affect the environment, in contrast to the regulations of the Council on Environmental Quality ("CEQ"), implementing NEPA.[12] Nonetheless, the Fifth Circuit has judicially created such a categorical exemption for activities authorized by Army Corps nationwide permits that are "inconsequential." Not only will such a categorical exemption fundamentally disrupt the regulatory scheme established by Section 106, but it is so devoid of regulatory standards or guidance so as to render the Army Corps' actions essentially unreviewable. At a minimum, this vague exception will invite undesirable litigation over its scope and application.

The regulations of the Advisory Council on Historic Preservation outline an informal consultation process for complying with Section 106 that is flexible, balanced, and remarkably efficient. Under the Advisory Council's regulations, even if the agency believes at the outset that its action will have no effect on historic properties, the regulations require the State Historic Preservation Officer ("SHPO") and the Advisory Council—the agencies with historic preservation expertise—to concur in that determination, and the regulations establish objective standards and procedures

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mine the procedures for compliance with Section 106. *See National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980). The regulations of the Advisory Council "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. 16 U.S.C. § 470s; *see National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

[12] *See* 40 C.F.R. §§ 1501.4(a)(2), 1507.3(b)(2)(ii), 1508.4.

for making the required assessment of adverse effects.[13] 36 C.F.R. §§ 800.5, 800.9. The process is also governed by timetables that prevent burdensome delays. *See id.* §§ 800.6(a)(1)(iii), (a)(2), (b)(1).

The Fifth Circuit's judicial exemption disrupts this regulatory scheme in several ways. First, the exemption will permit agencies to make advance, categorical determinations of "no adverse effect," without any awareness of what historic resources could be affected by a project, or what the effects of the project would be on those resources, and without consulting with the expert agencies. Moreover, the court's exemption will allow agencies to devise their own criteria for determining that a project is so "inconsequential" that it should be exempt from Section 106. For example, the criteria employed by the Army Corps for exempting nationwide permits from Section 106 relate to the project's "inconsequential" effect on navigable waters, and not its effect on historic properties. *See* 33 C.F.R. § 330.5(a)(3).[14]

The categorical exemption devised by the Fifth Circuit is not only disruptive of the statutory scheme,

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[13] This process is so effective in screening out projects that will avoid harm to historic properties that the Advisory Council issues at least 1200 determinations of "no adverse effect" each year, *see* 36 C.F.R. § 800.5(b), (d), and the SHPOs together process nearly 90,000 such approvals annually. *See* Advisory Council on Historic Preservation, Report to the President and Congress of the United States 42 (1988).

[14] The Aquarium Project, which the Army Corps would categorically exempt as being "truly inconsequential," is exactly the kind of project that *should* be subject to Section 106. While its impact on navigation may be minor, the SHPO has expressly determined that it will have significant adverse impacts on the surrounding historic district.

but it is unnecessarily so. The existing regulatory process already ensures that projects or activities which are "truly inconsequential" because they truly have no potential to affect historic properties need not be subject to the consultation and review process of Section 106. *See* 36 C.F.R. § 800.2(o) (Section 106 applies only to activities that by their nature "*can* result in changes in the character or use of historic properties"). Thus, activities such as the funding of a school lunch program or, in the case of the Army Corps, issuance of a nationwide permit authorizing the placement of temporary buoys or crab and lobster traps, 33 C.F.R. § 330.5(a)(4), (11), would not be subject to Section 106 under the current regulatory scheme, because historic properties could not even potentially be affected by such activities.

The exemption for "inconsequential" projects created by the Fifth Circuit will itself lead to "absurd" results, which stand established principles of administrative procedure on their head. Even if agencies were permitted to create categorical exemptions from Section 106, they would be obligated to do so consistent with the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553. This includes promulgating a regulation based on an explicit justification in the administrative record to ensure that the conclusions are the rational result of reasoned analysis and are amenable to judicial review.[15] In order for an agency to apply such a cat-

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[15] *American Maritime Ass'n v. United States*, 766 F.2d 545, 566 n.30 (D.C. Cir. 1985). Moreover, there must be a rational connection between the facts in the record and the inferences created. *NLRB v. Baptist Hospital*, 442 U.S. 773, 787 (1979); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-05 (1945);

egorical exemption it must first provide a reasoned explanation.[16] Here, the Army Corps has not even endeavored to comply with the barest formalities for assembling facts that would support such a categorical exemption.

The potential impact of the Fifth Circuit's ruling is by no means limited to the nationwide permit at issue in this case. The Corps has promulgated 26 different categories of nationwide permits, most of which have the potential for authorizing actions that can potentially harm historic properties.[17] With respect to all such activities, the court has potentially relieved the Corps of its statutory obligation under Section 106 to identify historic properties that could be affected by such activities, and to consider ways in which any adverse effect on historic properties can be avoided or mitigated.

NLRB v. Beth Israel Hospital, 437 U.S. 483, 501 (1978); *National Tourbrokers Ass'n v. ICC*, 671 F.2d 528, 532-33 (D.C. Cir. 1982).

[16] *See Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) (quoting *Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985); *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 741 (3d Cir. 1982)) (an "agency cannot ... avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.").

[17] *See, e.g.*, 33 C.F.R. § 330.5(a)(15) (discharges of dredged or fill material incidental to the construction of bridges across navigable waters, including coffer-dams, abutments, foundation seals, piers, and temporary construction and access fills); *id.* § 330.5(a)(21) (structures, work, or discharges associated with surface coal mining—which may disrupt archeological sites); *id.* § 330.5(a)(22) (removal of wrecked, abandoned, or disabled vessels—which may themselves have historic or archeological value).

Moreover, the Fifth Circuit's endorsement of such an exemption creates the potential for significant erosion of compliance with Section 106 by other federal agencies that have also enacted abbreviated permitting procedures for areas of regulatory responsibility which, in their view, require a lesser degree of supervision and control.[18] The Fifth Circuit's decision will allow these agencies to use "administrative convenience" as an excuse for evading their congressionally mandated environmental review responsibilities. This Court's review is necessary in order to correct the Fifth Circuit's error.

II. The Decision Below Precluding Joinder of Non-Federal Defendants Acting Pursuant to a Federal Permit Creates a Split in the Circuits That Undermines the Enforcement Mechanism Designed by Congress to Protect Historic Properties.

A. The Fifth Circuit's Dismissal of the Non-federal Defendants Was Wrong, and Conflicts with the Decisions of the Ninth and Tenth Circuits.

The Fifth Circuit also held that the district court lacked jurisdiction to join the non-federal defendants, who were authorized by an Army Corps nationwide permit under Section 10 of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 403, to go forward with a project that will have an adverse effect on the Vieux

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[18] *See, e.g., Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663 (9th Cir. 1989), *petition for cert. filed sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 58 U.S.L.W. 3336 (U.S. Oct. 30, 1989) (No. 89-701) (re ICC "exempt" abandonment procedures, 49 C.F.R. § 1152); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. ___ (U.S. Dec. 6, 1989) (No. 89-898) (re FCC "one-step" licensing procedures, 50 Fed. Reg. 23,417 (June 4, 1985)).

Carré Historic District, notwithstanding the Army Corps' failure to comply with the NHPA. The Fifth Circuit's decision rejects the well-reasoned opinions of two other circuits, one holding that joinder of non-federal defendants was appropriate under Rule 20 of the Federal Rules of Civil Procedure, and the other holding that joinder was required by Rule 19(a), under circumstances similar to those here. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1076 (10th Cir. 1988); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914 (9th Cir. 1977). This Court's review of the Fifth Circuit's decision is necessary in order to resolve this conflict among the circuits and provide consistent guidance on this critical jurisdictional issue.

In *Hodel* and *Tahoe*, the Tenth and Ninth Circuits used a joinder analysis under the Federal Rules of Civil Procedure to conclude that non-federal entities proceeding with environmentally harmful projects subject to a federal permit or approval could be enjoined pending judicial review as to whether the permit or approval was lawfully issued.[19] In both *Tahoe* and *Hodel*, the courts concluded that joinder of the non-federal permittees was appropriate, despite the absence of a direct cause of action against them, since

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[19] In *Hodel*, the court enjoined a local county from widening a road through federal Wilderness Study Areas on the ground that the Bureau of Land Management ("BLM"), which was required to approve the project under the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, had failed to comply with NEPA. In *Tahoe*, the court enjoined construction of several private developments, based on a regional planning agency's unlawful approval of the projects, in violation of an interstate compact.

without joinder, the non-federal defendants "could defeat the objectives sought in the suit against the agency." *Hodel*, 848 F.2d at 1077; *see Tahoe*, 558 F.2d at 917 ("the actual harm sought to be prevented . . . would have already occurred, thereby denying [plaintiffs] their requested relief even if they are successful [on the merits]"). Under the analysis of both the Ninth and the Tenth Circuits, the primary emphasis is on affording complete relief to the plaintiff.

Although the circumstances of this case are factually similar to those in *Tahoe* and *Hodel*, the Fifth Circuit nonetheless rejected the joinder analysis of the Tenth and Ninth Circuits, holding instead that the plaintiff was required to have a direct cause of action against the non-federal defendants in order to join them. 875 F.2d at 456-58. In doing so, the Fifth Circuit relied almost exclusively on this Court's decision in *California v. Sierra Club*, 451 U.S. 287 (1981)—clearly inapposite here—which holds simply that Section 10 of the Rivers and Harbors Act creates no implied private right of action. *See* 875 F.2d at 456.

The Fifth Circuit, while purporting to limit its ruling solely to the issuance of RHA permits by the Army Corps of Engineers, has distorted this Court's ruling in *California v. Sierra Club* into a broad taboo that not only would preclude claims under an entirely different statute—Section 106 of the NHPA—but also would preclude claims against a specific type of defendant—a non-federal permittee of a federal agency. As a result, the court's ruling below has created tremendous confusion.[20] This Court's review is

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[20] The potential chaos created by the court's analysis below is

essential to correct the Fifth Circuit's erroneous holding that *California v. Sierra Club*, 451 U.S. 287 (1981), would bar the joinder of non-federal permittees under a non-RHA claim, especially where such joinder is necessary to enforce Congress' mandate under Section 106.

B. Joinder of the Non-federal Permittees Is Necessary in Order to Afford Complete Relief to Plaintiffs.

Like the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, Section 106 by its terms places obligations only on federal agencies. 16 U.S.C. § 470f. Nonetheless, the Fifth Circuit's holding that federal courts are powerless to halt non-federal permittees from carrying out activities that may destroy historic properties, even when those activities have been federally authorized in violation of Section 106, is inconsistent with the language and policies of the NHPA and with the decisions of other circuits.

Section 106 of the NHPA was intended to ensure that federally licensed activities such as the Aquarium Project would not commence until after the licensing

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illustrated by a subsequent Fifth Circuit decision in which the court—without explanation—extended the *Vieux Carré* holding precluding jurisdiction over non-federal defendants to apply to *all* federal agencies. *See Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989) (non-federal defendants and license applicants dismissed in case involving FCC violation of Section 106), *petition for cert. filed*, 58 U.S.L.W. ___ (U.S. Dec. 6, 1989) (No. 89-898). In doing so, the court completely disregarded its original rationale limiting the judicial insulation of non-federal defendants to cases involving the Army Corps, based on *California v. Sierra Club*, and thus further eroded Congress's intent to protect historic properties.

agency has completed its consideration of the project's impacts on historic properties. To ensure compliance, and to provide a specific enforcement mechanism for the public, Congress amended the NHPA in 1980 to confirm explicitly the availability of a private right of action, which authorizes a "civil action brought in any United States district court by any interested person to enforce the provisions of [the NHPA]." 16 U.S.C. § 470w-4.

If left undisturbed, the Fifth Circuit's decision will cripple this private enforcement authority because courts will be powerless to enjoin federally permitted activities that may violate Section 106. The result of the Fifth Circuit's view is that a non-federal party may act on an unlawfully granted license with impunity, regardless of the potential damage to historic resources. This interpretation is contrary to what Congress intended when it amended the NHPA to bestow private enforcement authority.[21] Review of this issue is therefore necessary in order to afford complete relief to the plaintiff.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari and should reverse the decision of the Fifth Circuit.

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[21] *See Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985); *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784 (S.D. Ohio 1982).

Respectfully submitted,

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